UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

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TIMOTHY R. ELDER, *et al.*,

Plaintiffs,

v. Case No. JFM 10-CV-1418

NATIONAL CONFERENCE OF BAR EXAMINERS,

Defendant.

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MOTION FOR PRELIMINARY INJUNCTION and MOTION TO DISMISS in the above matter, held on Thursday, July 13, 2010, commencing at 2:17 p.m., before the HONORABLE J. FREDERICK MOTZ, in the United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

APPEARANCES:

DANIEL FRANK GOLDSTEIN, Esq.,
MEHGAN SIDHU, Esq.,
SCOTT CHARLES LaBARRE, Esq.,
Appearing on behalf of the Plaintiffs;

ROBERT A. BURGOYNE, Esq.,
Appearing on behalf of the Defendant;

MAZEN M. BASRAWI, Esq.,
Appearing on behalf of the U.S. Assistant Attorney General, Civil Rights Division.

Reported by:
Julie A. Wycoff, RPR
Official U.S. Court Reporter

(Proceedings commenced at 2:17 p.m.)

DEPUTY CLERK: This Court resumes in session. The Honorable J. Frederick Motz presiding.

THE COURT: Motion for Preliminary Injunction in the case of Elder versus National Conference of Bar Examiners, JFM 10-1418.

You all may be seated.

Counsel, identify yourselves for the record.

MR. GOLDSTEIN: Good morning, Your Honor. Daniel Goldstein of Brown Goldstein Levy on behalf of the plaintiffs.

With me today is Meghan Sidhu, also of Brown Goldstein Levy; Scott LaBarre of the LaBarre Law Firm, he is admitted pro hac vice; next to him is Michael Witwer, one of plaintiffs; and next to him, Tim Elder, another one of the plaintiffs.

Anne Blackfield, who is another plaintiff had emergency eye surgery and could not make it today and so is not in the courtroom.

And Scott Curtis who's the assistant attorney general for the Maryland Bar of Law Examiners asked me to tell you he's in the courtroom if the Court had any questions for him, and he's at the back.

THE COURT: All right.

MR. BURGOYNE: Good afternoon, Your Honor. Robert Burgoyne of Fulbright and Jaworski, appearing on behalf of the National Conference of Bar Examiners.

MR. BASRAWI: Good afternoon, Your Honor. Mazen Basrawi, counsel for the Assistant Attorney General for the Civil Rights Division, on behalf of the United States.

THE COURT: Thank you.

All right. We have obviously two motions, but it seems to me, the motion to dismiss can get -- for the issues can be discussed in the context of the motion for preliminary injunction. So why don't I have the plaintiffs go first. Tell me why I should grant a preliminary injunction.

MR. GOLDSTEIN: Thank you, Your Honor.

THE COURT: Belinda, you're free to --

Does anybody have any exhibits or anything? This is all legal argument, isn't it?

MR. GOLDSTEIN: Well, we had mentioned, Your Honor, that we ask want to demonstrate for the Court --

THE COURT: I don't think I need to see that. Then I'd have to hear a reader and all kinds of things, so I don't think I need that.

Belinda, you're free to stay, you're free to go.

MR. GOLDSTEIN: May I make a proffer with respect to what this demonstration --

THE COURT: Of course.

MR. GOLDSTEIN: -- would involve?

Your Honor, what the demonstration of JAWS, which is the screen-access software that Mr. Elder uses, would reflect is

that he can, as he goes through a question, navigate within the question. He can set a default speed beforehand that's considerably faster than most human speakers can speak intelligibly. He can set it so that, for example, if something is in quotation marks, it is read in a different voice to signal to him that that language is in quotation marks.

He can choose to have exclamation points actually verbalized so that if something is an a excited utterance, he's going to know it because he has preset the JAWS software to give him that punctuation mark. He could choose also, for example, as a contextual matter, to have it vocalize open and close parentheses. But given that each of the answers are in parentheses, he might choose to change that setting as he goes forward.

He can have it set so that it will pause where there are commas and pause where there are paragraphs. And, of course, he can instantly choose to navigate not only word by word, but letter by letter if, for example, there were a Latin phrase or something whose pronunciation was not familiar to him, to enable him to know immediately what he was hearing. And so it's quite an agile software.

With respect to Mr. Witwer, he's a ZoomText user. What you would have seen with ZoomText is that the cursor is a large yellow cursor, perhaps an inch and a half in size.

THE COURT: Excuse me, this is probably -- do you want

to sit in the back? You can come around.

MR. GOLDSTEIN: Perhaps an inch and a half in size, and there is a bright red horizontal line and a bright red vertical line. And as the text is vocalized, that moves. So it allows someone with residual vision who, like Mr. Witwer, is not actually reading visually, but needs it to orient and navigate to be able to see where the location of cursor is at all times.

It is also has the same -- not the same, but similar -- text-to-speech software to that in JAWS so that he is principally taking in the information in a oral fashion but it's supplemented by the fact that he can orient himself. It makes it easier to go to Question 2 or to toggle back and forth between Choices B and C, and so on, because as his affidavit establishes, he is a visual learner.

The other thing I think you would have seen with this demonstration but may be familiar to you if you've used Word, is that the saving of a file that's contained on a thumb drive or a CD cannot be inadvertently done. And anybody who was proctoring the exam or watching the screen would see the same thing you and I see when we try to save a file, which is that we're asked if we -- we have to do -- first take the step of asking to save a file, and then we're given a choice about where to locate it, and then we have to select that. It's a four- or five-level step.

So this is what we believe you would have seen had we

made that demonstration.

THE COURT: Very effective proffer, thank you.

MR. GOLDSTEIN: Turning to the -- this case, what it is about, as you know, from our perspective is ensuring that the plaintiffs are afforded an equal opportunity to compete in securing the requirements to pursue their chosen profession, a rights that's guaranteed by federal law. Not being able to see is a nuisance, Your Honor; not being able to compete on a equal basis is a handicapped, and that's the handicap we seek to overcome.

In its motion to dismiss or for summary judgment, NCBE asserts that this Court has no jurisdiction to rule on the assertion of a deprivation of a federally guaranteed civil right, even where -- as here -- there is no adverse state ruling of the kind that could raise a jurisdictional barrier.

It also asserts that it doesn't offer this exam, though it develops it, disseminates it, controls the format, and controls the circumstances under which the examination is offered. It makes that argument, I submit, by reading language into the statute; that is to say, language that it must offer it directly to an examinee, that is simply not there and would make the statute at odds with the congressional intent to fill the gap after Title II and 504 already applied to licensing exams given by the State and by other governmental entities.

It also asserts that just as a book store need not

alter its inventory to provide Braille books, so, too, it need not alter it's pencil-and-paper test to provide an accessible version, be that Braille or electronic. Despite the fact that there's a specific regulatory command that requires it to do just that, a command that does not apply to or find any parallel for book stores or other places of public accommodation.

In doing so, it makes repeated references to Title III cases that have no application to testing agencies, and we've cited to Your Honor ***Doe*** and ***Breimhorst*** that make it very clear that when plaintiffs want to use other parts of Title III for other testing entities, they may not, and the same is true for the defense. And for good reason.

If I can just give an example, ***Dobard*** is cited by defense counsel, the ***BART*** case, where the Court said, you know, if you pick an effective accommodation, the fact that it may not work for this particular plaintiff doesn't alter the fact that ***BART*** has made -- met its obligations under Title II.

Well, under that way of thinking, what the NCBE could do is offer only a Braille test, and the fact that only 10 percent of the blind population today reads Braille would just be too bad for that other 90 percent.

In fact, what the law commands -- and I say this regardless of whether you look at the regulation as we believe you should or a reasonable accommodation as the NCBE asserts, what the law commands is an equal opportunity to compete.

And what the record here shows, very powerfully, I submit, is the following: You know from the affidavits of Mr. Witwer, Mr. Elder, and Ms. Blackfield that their primary reading method is the use of screen-access software. It's the way they succeeded academically. It's the way they've learned their legal materials. That's the -- that this is their primarily reading method is not in dispute.

You have three uncontroverted medical experts -- excuse me, three uncontroverted experts. Dr. Malkin from the Wilmer clinic, who's explained not only why screen-access software allows Mr. Witwer to compete on an equal basis, but she also explains why the alternatives offered by the NCBE, the alternative accommodations, are inferior and would not allow competition on an equal basis. That testimony is not contradicted in this record.

Similarly, Mr. Smith, the vocational rehabilitation specialist who's worked for many years for the Department of Rehabilitative Services has explained why for Ms. Blackfield the use of JAWS is, indeed, the only thing that puts her on an equal footing and gives her an equal opportunity to compete. And he, too, explain why the other alternatives are inferior.

And finally, Dr. Stimson, on a behalf of Mr. Elder, establishes the same thing. Dr. Stimson's affidavit is particularly helpful, because as a cognitive psychologist with a doctorate in -- sorry, someone with a doctorate in cognitive

psychology, he explains the reading process and how while we think we read linearly, in fact, we constantly, and without thinking about it, move back and forth within the text, speeding up and slowing down, and how the screen-access software essentially allows the same thing to be done orally that we do visually.

All of that testimony is uncontradicted, as is the testimony of Dr. Schroeder, who explains that one's primary reading method is the one that allows someone to focus on content and not the process of reading, and that's critical. If you're going to focus on the test itself, you can't be stopping to think about how you're taking the content in or taking it in in an unfamiliar manner or method.

And finally, Dr. Schroeder explains that today screen-access software has become common and that it is recognized by schools and by employers as a reasonable accommodation.

None of that is disputed.

The NCBE does suggest that the plaintiffs are simply asking for their preferred accommodation. If that is what our pleadings appear to say, then I have not done a very good job of expressing the plaintiffs' point of view. We don't seek any kind of preferential treatment. We don't seek a preferred accommodation. We seek an appropriate accommodation that will allow the plaintiffs to be tested so that the test results will

reflect their skills and their knowledge and their capabilities and not their disabilities, and that's what we're seeking.

The NCBE has not offered any evidence that the accommodations it offers would provide a quality of opportunities to these plaintiffs, provide an opportunity to compete with their sighted peers on equal basis. I have not seen any claim in their papers that the accommodations they proposed to offer do so.

Rather, they make the argument that if they offer certain accommodations that may convey materially -- material nonvisually, then that suffices, whether it is the suitable accommodation or not. We believe that -- and I'll turn in a second to which standard -- that under any standard the Court might apply that this makes it likely that we will prevail on the merits of our claim.

The standard that is urged by the NCBE is that of reasonable accommodations. I'm not going to repeat what I've put in our pleadings, but I think what is critical to understand is that while that standard is not in the statute and not in the regulations, that what it has in common with the standard is what this Court said in the *Talbot* case, which is that a reasonable accommodation is an accommodation that provides a quality of opportunity.

What the Court said there was: "Accordingly, the reasonable-accommodation question asks whether the

accommodation, one, would be effective -- that is, would it address job-related difficulties presented by the employee's disability -- I'm skipping the cite -- and, two, allow the employee to attain an equal level of achievement, opportunity, and participation that a nondisabled individual in the same position would be able to achieve.

That language --

THE COURT: I think she went on to say you don't have to use the best method, but I could be wrong.

MR. GOLDSTEIN: What she went on to say was that it's the employer's choice, but I would submit to you that the difference between an employment situation and this is the employee -- it's a long-term situation where the employer has many tools.

It can -- I don't know how you talk about the best or not the best if the choices are, well, we could change the job duties, we could transfer, we could provide some software that might solve the problem.

When you have that -- and it's a symbiotic relationship. You've got the employer's interest and the employee's interest at work that need to work out over the long term. And it makes a lot of sense to talk about that in that context, about what an employer can do and so the employer's hands aren't tied. And that may be why the word "reasonable accommodation" and the whole interactive process that's

described in Reasonable Accommodation is Title I and it's not in Title III.

So I think -- I think you're right, Your Honor, that there is a difference here. And in any event, we're looking at a statute that -- rather, a regulation that does talk about "best ensure" and that is parallel to the Title I requirement that's in the statute for "most effective," and that is in the 504 regulation, essentially follows this same language.

So the -- there has been no claim at any time by the NCBE that anything they offer would best ensure that the results for these plaintiffs would reflect their abilities rather than their disabilities. And so if you apply the regulatory standard, it's very clear that we succeed.

The argument is offered that this regulation is somehow defective and an overreach under *Sandoval* and *Harris*, and that argument is both wrong and proves too much. We cited to the Court the Supreme Court decision in *Morton*.

*Morton* makes very clear that when there is language, as there was in *Morton*, that was ambiguous in the statute -- and the meaning of "accessible" in 12189 is not altogether apparent -- then the regulations can't be contrary to the terms of the statute. And as long as it is not arbitrary -- and clearly there is sound reasons why the Department of Justice could have used the language it did and so long as the regulation furthers congressional intent -- then it is valid,

and the Court must defer to the meaning of the regulation as interpreted by the implementing authority.

THE COURT: I'm sorry, repeat for me again your argument of why the statutory language is ambivalent or unclear.

MR. GOLDSTEIN: Yes, Your Honor, if I can just -- let me get the case.

In *United States v. Morton* -- sorry, there are so many -- we've thrown so much paper at you, Your Honor, that I've got a lot of cases in this notebook --

THE COURT: That's fine.

MR. GOLDSTEIN: -- I just need to get to it.

In *United States v. Morton*, the statute and regulations dealt with the immunity of suit that some members of armed services received from certain kinds of garnishments and cases of that sort.

And in interpreting and giving conclusive effect to the regulation for the implementation, what the Court said at 467 U.S. 834 was "because Congress explicitly delegated authority to construe the statute by regulation" -- which is the situation with the ADA -- "in this case, we must give the regulations legislative and, hence, controlling weight, unless they are arbitrary, capricious, or plain contrary to the statute.

So the Court then looked at the -- those three standards and said "the regulations" -- and this is at 835 to

836 -- "cannot possibly be considered clearly and consistent with the statute or arbitrary, since the terms "legal process" and "court of competent jurisdiction" are, at least, ambiguous.

In other words, what the Court said is since the statute isn't completely clear of what is or isn't a court of competent jurisdiction and since the statute doesn't define what was meant there by "legal process," it was appropriate for the regulations to define those terms.

And it went on to say that the regulation furthered the congressional intent of facilitating the speedy enforcement of garnishment orders and, therefore, because it, on the one hand, addressed things that weren't clear from the statute alone and, second, furthered the intent, the regulations were valid.

And we've cited to the Court a number of cases that have said with respect to the ADA that Congress began with a very broad brush and then left it to the DOJ, in the case of Title II and Title III; EEOC, in the case of Title I --

THE COURT: What is the statutory language that the regulation is trying to interpret?

MR. GOLDSTEIN: The statutory regulation --

THE COURT: Statutory language.

MR. GOLDSTEIN: I'm sorry.

Statutory language is 12189. 12189 says that any person that offers examinations or courses related to applications, licensing, certification, or credentialing for

secondary or post-secondary education, professional trade purposes, shall offer such examinations or courses in a place or manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

THE COURT: The key word is "accessible," which you say is ambiguous.

MR. GOLDSTEIN: Yes, it is, Your Honor.

For example, just to give you another example, if you look at the operative language of Title II, which is designed to give equal access to programs that are operated by the State, 121 -- Section 12132 of Title 42, you'll note that -- trying to page through it here -- you'll note that it says nothing about any kind of equal access.

It says: "Subject to the provisions of the subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."

So if you look at that language, then theoretically, as long as Mr. Lang could crawl to the second floor of the Tennessee courthouse, there was no violation of Title II because he wasn't being excluded. But the regulations that exist pursuant to Title II make it very clear that equal access is what it's all about, and we have cited to you the very clear congressional language, indeed the findings that are in the

statute, as to the purpose of the statute that it's to provide equal access.

And so I submit to you that it's not contrary to the terms of the statute; it's not outside the scope of the statute to talk here about equal access -- or rather to talk -- those aren't the terms, to talk, as the regulation does, about having the results reflect a person's abilities and not their disabilities. And I ask you to consider the contrary: Could you say that an exam was accessible if the results largely reflected a person's sensory impairment? In what sense would that be so? I don't think that's at all clear.

So I suggest that this regulation is valid, and I further suggest that the passing reference to *Harris* and *Sandoval* that we see falls far short of a serious challenge to the regulations.

THE COURT: This might sound like a very cold question, but what about the issue of overcompensation? If the computer software is that good, shouldn't the authorities -- or shouldn't there be something in the record to reflect whether double time or time and a half is appropriate, or maybe something less than that is appropriate?

MR. GOLDSTEIN: It's not a cold --

THE COURT: In other words, you get overcompensation and actually the plaintiffs would benefit.

MR. GOLDSTEIN: It's absolutely not a cold question.

It's a very appropriate question. It's one in which the NCBE chose not to make a record.

THE COURT: But you didn't either, and you're making the motion.

MR. GOLDSTEIN: Well, yes, except than the NCBE has made clear they're prepared to provide the additional time. Had they said if screen-access software is not granted, we don't think it's appropriate to provide the additional time, then we would have been delighted to put that in the record, but we didn't understand and do not understand it to be in dispute.

The process what's called -- I always have trouble pronouncing this -- saccading, the movement of the eye, is, I believe, the fastest human movement there is. And we are not seeking to get any more advantage than anyone else. And if it -- less time were appropriate, given the reading speed using the software of these plaintiffs, then we'd be happy to do so.

But I believe that -- in fact, I'm certain of it -- that what we do have in the record, Your Honor, is the accommodation requests include statements by physicians that cover not only the screen-access software, but the amount of time that would be appropriate to put these plaintiffs on an equal footing using the -- that screen-access software.

And perhaps Ms. Sidhu can find the record cites for that while I address other questions from the Court or other matters in this argument.

THE COURT: Well, one of the decisions from the Maryland Board of Examiners about that, because it granted the time and said we can't provide the software.

MR. GOLDSTEIN: Correct. Well, they have the software; they just can't provide the exam in electronic format.

THE COURT: Can't provide -- that's true.

MR. GOLDSTEIN: And that's a segue, actually, on the question of subject matter jurisdiction which, perhaps, I should turn to next.

Ordinarily under Sections 1331 and 1343(4), this Court has jurisdiction over civil rights claims where the claim is one guaranteed by a federal statute. There are exceptions under a variety of abstention doctrines, and the NCBE has carefully stayed away from discussing any of those abstention doctrines. But the one that applies here, if it were to apply it at all, would be *Rooker-Feldman*.

THE COURT: Actually, you can -- I'll hear from -- the same would apply with Mr. Burgoyne's issue. It seems to me that that court of appeal's decision has to do with relative -- allocating relative responsibilities between the court of appeals and circuit court, and it's got nothing to do with the federal court. I find it very hard to believe that a federal court can't enforce a federal right if it was being violated, but I'll -- you can say something about how that will apply.

MR. GOLDSTEIN: I will follow Rule 2, then, and pass

on then to another issue, Your Honor.

Another argument that's offered here is that NCBE does not offer the examination.

THE COURT: Which, again, is a very cold issue, but you better tell me why Mr. Burgoyne is not right on this one, because I don't see them offering a darn thing, except to the Maryland Board of Examiners. I don't see them offering anything. If Congress made a mistake, Congress made a mistake, and their argument can be made.

MR. GOLDSTEIN: Well, Your Honor, if you look at 12189, I'm looking for that "to" language you're talking about. It doesn't say "offer to" examinees. It doesn't say "offer to" applicants. It doesn't say "offer to" -- there's is no privity statement in 12189. We're not dealing --

THE COURT: But the person has to be controlling the selecting and making it in a place and manner accessible to persons with disabilities.

What does the defendant here have to do with placement? Why did you sue him? Along with a number of concerns, sue the licensing authority. And if they want a third party in, the Board, they'll do it.

MR. GOLDSTEIN: Well, we could not sue -- first of all, I think --

THE COURT: You probably couldn't --

MR. GOLDSTEIN: Well --

THE COURT: -- injecting issues into the case.

MR. GOLDSTEIN: And the most obvious of which, we had no adverse decision from the State Board of Law Examiners. There was no -- there was no argument on their part that they -- this was not an appropriate accommodation.

THE COURT: If they're the ones offering the exam within the meaning of the statute, then they're the appropriate party.

MR. GOLDSTEIN: Well, first of all, Your Honor, you say if they're "the" party offering the exam. And I am not clear where you're finding that only one party can offer an exam. That's not at all clear to me that that's --

THE COURT: They are "a" party.

MR. GOLDSTEIN: Yes, they are "a" party, and they --

THE COURT: And according to Mr. Burgoyne, they are "the" party.

MR. GOLDSTEIN: I'm sorry?

THE COURT: And if the defendant is right, they are "the" party.

MR. GOLDSTEIN: If the defendant is right, but what the defendant has done is to show that the bar administers the exam. Administers the exam. And if you go to Webster's and you -- or to Roget's -- and you look for synonyms to "offer," you will not find "administer" as a synonym, because it's not.

I suggest, with all respect, that you're using "offer"

in a metaphorical sense.

THE COURT: No. Forget offer, what about the statute: Applies to any person offering examinations -- ellipsis points -- that offerers shall offer such examinations in a place and manner accessible to persons with disabilities.

What authority did the defendant have to select the place?

MR. GOLDSTEIN: The NCBE he has every right to condition, saying if you want to use the MBE, you have to give it in an accessible place.

Where is it read that the NCBE cannot impose that condition, Your Honor? Of course it can. Just the way it imposes conditions on security, just the way it imposes conditions on the manner in which it is offered.

So if it can impose restrictions on the manner in which it's offered, and we're here because it has, then what would keep it from saying either way: You have to offer it in a five-story building with no elevator and 16 steps in the front, or you have to offer it in a place that's accessible, or we're not going to send you the exam.

I mean, you have to understand the practical aspects of this. If the -- excuse me. If the NCBE -- excuse me if the Maryland Board of Law Examiners wanted to, they could, without violating copyright, make an electronic copy of this exam. That's a classic definition of Fair Use. There is only one

problem; which is, they'd never be able to offer the multistate again. The power relationship here is very, very clear. The NCBE controls the circumstances under which it allows state bars to do so.

And we've given you Exhibit A, is the supervisor's manual from the National Conference of Bar Examiners, and it gives, step by step, all of the things that it requires in the manner in which the exam is given as to the scheduling of it; the use, selection, and responsibility of proctors; the seating arrangements; the receipt of materials; the distribution and post-distribution requirements.

You know, the National Board of Law Examiners has an independent duty under Title II as to the place where it's given. I mean, I suggest to you a highly theoretical issue in that regard, but there can be no question after you read this manual who has the true control. And, again, that's -- that's why we're here.

There is no -- in the definition of -- rather, in the use of the word "offer," there's been no definition offered by NCBE, other than: Whatever it is that we're doing, it's not offering. And you have to consider this against the landscape that, whether it's optometry or surveyors or engineers or veterinary medicine, it is the case now -- it was the case when the ADA was passed -- that there are national organizations that devise tests for national standards they use --

THE COURT: But they can give them now for anywhere from graduate record exams, the law boards, even the medical examinations. I understand it is different. And they actually are offering -- and even the professional responsibility exam -- they all are offered by the test maker.

MR. GOLDSTEIN: Well, the -- I think that's true with respect to the MPRE. I don't think that's necessarily -- and with the GRE, of course, that's not a state licensing exam at all.

But to say when they have the degree of control that they do, that that doesn't constitute offering, I suggest, Your Honor, requires really reading in (A) "to whom it's offered," because it certainly is offered to the Maryland bar; it means reading in that it can't be offered indirectly; it means reading in that there can't be more than one person offering. And none of that is consistent, I suggest to you, with the broad reading that you're to give the Americans with Disabilities Act.

Let me turn, if I might, to the four factors that the NCBE claims are determinative of this case.

THE COURT: Do you disagree?

MR. GOLDSTEIN: Oh, I'm not talking about the four factors for preliminary injunction.

THE COURT: Oh, okay, excuse me.

MR. GOLDSTEIN: No, no. I don't -- that scenario, we're all on board. ***Winter*** is ***Winter***.

No, page 3 of their opening memo -- and they repeat this in their reply they filed yesterday -- they say there are four factors that resolve the overarching legal issue. The first is they say they offer the appropriate auxillary aids and services that are listed in the regulation and, therefore, are required to do nothing more.

The problem with that argument is the list is explicitly nonexclusive. And as Judge Breyer explained in his second ***Enyart*** opinion, the regulation, after listing some auxillary aids, goes on to say "or other effective methods of making visually delivered materials available."

What is the function of that language if it's not meant to indicate that just doing what's on the list may not suffice in the provision of appropriate aids?

That language clearly informs the testing agency that the listed regulations are not exclusive. And NCBE has failed to show that screen-access software is not -- to use that language from the regulation -- "an effective method of making visually developed materials available."

Let me just -- the mention of ***Enyart*** reminds me, going back for a minute to the claim that the -- NCBE doesn't offer this exam.

They have said that the reason they didn't say anything about that in the ***Enyart*** case was the MPRE case was also there. That, I suggest, is a non sequitur, because if they

didn't have to provide the NBE in accessible format because they don't offer it, then that surely would have been a significant win. Then they would have only had to deal with the MPRE, and --

THE COURT: So that they're judicially estopped from -- what flows from that? Suppose they made a mistake and didn't raise the issue. So what?

MR. GOLDSTEIN: I think the -- I think that's a fair rejoinder, Your Honor.

THE COURT: It's not a rejoinder. It's --

MR. GOLDSTEIN: But I believe it's a fair question at the moment, I'm sure, that tonight I'll realize.

THE COURT: No, no. They're making a tacit admission that they obviously consider themselves an offerer.

MR. GOLDSTEIN: But it does seem rather surprising to see this raised so late --

THE COURT: It does. I understand.

MR. GOLDSTEIN: The -- but we haven't raised the factor of judicial estoppel, and I think whatever limit the number of issues are that can be raised in a single case, we're probably close to the limit.

The second factor before that they've talked about is that that the menu of accommodations it offers has been twice approved by the DOJ in settlements. And I have to say for the life of me, I don't understand that argument on several grounds.

First of all, the first settlement in Doug Elliott's case involving his complaint that he couldn't -- that his reader wasn't qualified, the social work exam, it's over a decade ago, long before the technological changes we've all come to see take place. But nothing about that settlement implied anything, one way or the other, about screen-access software. What prompted that settlement was the fact that the reader wasn't qualified, and the complainant was insisting on some qualifications for readers, which, by the way, don't exist.

THE COURT: All this really means to me -- and, Mr. Burgoyne, but really is to ask you -- you're absolutely right about the language in the statute. It's not inclusive. The settlements, at least one of them, is, you know -- questions. But the fact of the matter is you have a history of what has been deemed to be an entirely reasonable accommodation. You are here asking for extraordinary relief on a record which has not yet been fully developed.

I frankly don't know yet. I mean, I certainly understand the hardships of not passing the bar examination, you know, the humiliations, concern of that, having to restudy. But I don't know whether your client is going to pass it or not, so in terms of balancing equities, there's a problem.

But the relevance of the history is that there is a demonstrated background that this is a good way to approach the issue, whether you characterize what your clients want as their

preferred way or not, you are, in effect, giving to your clients the ability to choose which way they're taking the test.

I will certainly ask Mr. Burgoyne. There must be good reasons why they're resistant to this. Some may be the security concerns which really aren't fully briefed yet; there may be concerns about -- you know, we just don't know enough yet to know about -- in fact, I'm going to ask him about the test, why for the test they didn't adopt it.

But they have concerns. And to say, wait a minute, let's not do this now, we have a perfectly clear history of -- even though it's not inclusive, we have the statute saying this is adequate, we have settlements which say this is adequate, we have a history that thing -- short of what the plaintiffs are asking for -- is adequate.

Don't -- Judge, go ahead and issue an extraordinary remedy. Particularly, we don't know if the case is going to be ripe because we don't know if the plaintiffs were going to fail the board examination.

Just leave it alone, let the record be developed, and make your decision. Then that -- and there are issues that maybe you're not going to win, either because of the outcome of -- after discovery or because they don't offer the exam.

So there's a lot to be said for just, you know -- you could very well be right, but let it be decided in due course rather than under an extraordinary remedy.

MR. GOLDSTEIN: Well, I think the problem with that approach is severalfold.

First of all, you said they must have good reasons not to want to do this. I thought the function of briefing, the function of pleading, the function of submitting evidence into a record was to do just that. And the regulation says that you must offer an appropriate accommodation unless it is unduly burdensome or would fundamentally alter the nature of the test.

THE COURT: They're not briefing the issue of unduly burdensome.

MR. GOLDSTEIN: Nor do they claim this is not a Palmer Writing Method test. They don't -- although they keep mentioning it's a paper-and-pencil test, they have not briefed either one of the affirmative defenses. So the only question becomes is it an appropriate accommodation.

And there have been noises about the security issues, so we thought that --

THE COURT: The real question is whether -- if they offer it, whether or not it's accessible to your clients. It's not appropriate examination; it's -- within the statutory language, is it accessible.

Now, the regulation says it's got to be the best way to ensure that, and that's a legal issue.

MR. GOLDSTEIN: Well, or a reasonable accommodation has to provide equal opportunity. And what we have shown and

they have not shown and the record is entirely 100 percent one-sided on this --

THE COURT: No, it's not. You've got -- that's why I raised in the context of the history of what they're offering: more time, the reader, everything else. There's a history that this is perfectly all right.

MR. GOLDSTEIN: If that is the case, Your Honor, and they don't have to offer what best ensures but merely have to offer reasonable accommodation -- it doesn't have to be equal opportunity but can be a menu -- then they can offer just Braille, or just Braille and large print.

THE COURT: No, they can't.

MR. GOLDSTEIN: Well --

THE COURT: They wouldn't then be able to rely on the history of the various things that they offer. I mean -- and they're not taking that position.

MR. GOLDSTEIN: Your Honor.

THE COURT: In fact, they couldn't offer just Braille because the record reflects that a lot of people don't know Braille, including your clients, I think, but --

MR. GOLDSTEIN: That's -- that is correct, but you've got to make this work with some legal standard. And it doesn't work with the reasonable accommodation legal standard because you've got nothing in this record to show that a reader provides equal access, and you have a substantial --

THE COURT: You have a demonstrated history. That's the point. You have a long history that this is exactly what is -- now, there may be people who say you need more, and they may very well be right, but it's crazy not to take into account another kind of computer program.

And this case may very well be a mechanism for proving that, but you had a long established record of what is offered by the defendant has been deemed and presumably should be considered entirely reasonable, and leave it for the litigation to determine whether it's the best or not.

MR. GOLDSTEIN: Your Honor, I wouldn't dispute, for example, that there's a long history that large print is an effective accommodation. Not at all. But for whom?

The one thing I know this Court has said before over and over again is that the question of what's a reasonable accommodation is an individualized inquiry. An individualized inquiry.

You do not have in this record that these accommodations are suitable for all blind people. That's not in any of settlements. That's not in any NFB resolution. You have no record here, Your Honor, no record here, that these -- this preset menu of accommodations is suitable for all blind people. Just not there.

Now, let me turn briefly to this question of irreparable injury, if I might.

You have not only the two *Enyard* opinions, *D'Amico*, *Agranoff*, and *Chalk* in the Ninth Circuit, but you have *Jones* that makes it very clear that justice delayed is justice denied.

If these plaintiffs have to wait in order to be entitled not to be burdened by discrimination in taking this examination, that's by no means a self-inflicted wound any more than if you said, look, I'm sorry about the steps, but he's just going to have to crawl up, maybe they can give him a wheelchair inside; that no one should have to subject themselves to discrimination as a condition of taking the bar.

And no one should have to subject themselves to the delay. Mr. Elder is going to be the disability rights fellow this year, the second one, at Brown, Goldstein & Levy. And he wants to take depositions, and he wants to argue in Court. He wants to do a lot of things as the disabilities rights fellow that, indeed, he should be able to do.

But if he has to wait till next February when we have a final ruling -- if we have a final ruling and we can get it up to the Fourth Circuit -- and, of course, it won't be. It will be 2013, 2014 when will we have this final ruling. But if he has to wait, of course he's damaged. He's damaged in ways that can't --

THE COURT: Not sure I accept your premise that it will take that long. If I ruled your way after a full trial, you'd have to get -- the other side would have to get a stay

from the Fourth Circuit to prevent the bar exam from being administered to them, which I hope would not happen, if I ruled your way all along.

MR. GOLDSTEIN: Well, perhaps --

THE COURT: So it may be that long, but it won't definitely be that long. You can't say definitely that long.

MR. GOLDSTEIN: Right. And I would suggest, Your Honor, that there is not a one-bite rule in the law here that one has to first take and fail to have been injured. And, in fact, that's not the law. Or that you must subject yourself to discrimination in order to be entitled then on the second round to relief.

Your Honor, I know the deep respect you have for institutional decision-making, and deservedly so. And there certainly has been a long history of contentiousness between the disability community as a whole and testing agencies, whether it's about flagging, whether it's about qualifying readers -- still an open battle -- whether it's about getting Braille copies -- also still an open battle -- and that the concerns that agencies have that if they give certain accommodations that could affect the validity of their testing if someone got an unfair advantage, for example, by getting more time than they were entitled to. And those are legitimate concerns. Like security.

But at some point, if the record is clear and clear on

a preliminary basis, then it is appropriate to require the relief as is sought here. And I submit to Your Honor that if we were to go to trial tomorrow on this record, you would be --

THE COURT: But you wouldn't suggest that because you don't think -- you don't think I should consider summary judgment, so I don't think we should be contemplating going to trial on this record tomorrow.

MR. GOLDSTEIN: Contrary. I didn't move for summary judgment because there are conflicts in the record, and --

THE COURT: No, but you also talk about it being an undeveloped record. That's one of reasons we shouldn't even proceed to summary judgment.

MR. GOLDSTEIN: It can always be more fully developed. I'm dying to take their deposition on security, but if Your Honor wanted to convert this to a final injunction, I think we've got the record. Now. I do.

I think that on this record as you face it today, you would be compelled to rule for the plaintiffs.

THE COURT: Thank you very much.

Mr. Burgoyne.

MR. BURGOYNE: Thank you very much, Your Honor.

I will start on the jurisdiction point, just to get that out of the way.

Your Honor, given the important of subject matter jurisdiction and given the extremely strong views expressed by

the Maryland Court of Appeals in the *Kimmer*, decision we thought it appropriate to call that decision to you.

Obviously, it was not our lead argument. It was something that we felt an obligation, just as if there was precedent that was relevant to call it to your attention. We certainly respect whatever ruling you have on that issue.

Moving on then, Your Honor, I'll start with some introductory comments, and then I guess what I -- probably most effective is to respond to the concerns you've identified in discussions with Mr. Goldstein.

This is certainly an important case, Your Honor. While you've got three individual plaintiffs before you and a single testing organization, there can be no question that the outcome of this case could well affect dozens, if not hundreds, of testing organizations and certainly could extent beyond the scope of individuals with disabilities.

Were you to hold, for example, that "best ensure" requires a testing organization to get down into the weeds and do what almost amounts to a psychometric analysis on how well someone will perform various auxillary aids, I can guarantee you that every individual seeking accommodations will take the position that the accommodations they request are the only ones that will best ensure that the accommodations properly address their knowledge and abilities rather than their disabilities.

Press releases and rhetorical flourishes aside, Your

Honor, there are no villains in this case. As Your Honor notes what NCBE has offered by way of accommodations to the state boards of bar examiners on the Multistate Bar Exam are precisely those accommodations which the National Federation of the Blind has actively encouraged and, in fact, I think the word they used is "demanded" testing organizations to provide.

Likewise, we're making the exam available in exactly the formats that the United States Department of Justice concluded in 2000 would -- in the words of the acting assistant of the Department of Justice for Civil Rights -- "provide a fair opportunity for individuals with visual impairments to demonstrate their knowledge on standardized tests."

So as your Honor correctly noted, there is, in fact, a history here against which our arguments are made.

In this particular instance, we happen to disagree with the plaintiffs regarding the meaning of Section 12189 of the ADA. As I tried to convey in our brief, Your Honor, what it all comes down to is there are evolving technologies.

They would like to use those evolving technologies immediately in the interest of taking the multistate bar examination. Our client believes that those technologies are not yet to the point where we have a sufficient comfort level that we should put our secure tests in that format for administration to individuals with visual impairments.

Conversely, we do provide that format for an exam

which is a nonsecure exam. To the best of my knowledge, Your Honor, there is no other testing organization which makes its paper-and-pencil exams available in the format that's being requested by the plaintiffs in this case.

THE COURT: And the record doesn't reflect why after the tests you all decided not to adopt, does it? I mean, it's just reflects that you decided not --

MR. BURGOYNE: There is a declaration in the record, Your Honor, from a Kent Brye, and there's a declaration from the National Conference of Bar Examiners' president. And what the NCBE president indicates is that while they had hoped that the pilot program would indicate that you could get economies of scale and that doing this in that fashion would be feasible from both a cost-administrative and security perspective. When all was said and done, they concluded that was not the case.

The security issue is still there. We have -- we walked through the various scenarios from allowing an examinee to put it on his or her own computer to having a state board -- in this case as Maryland has offered -- to purchase laptops and provide it that way, to us putting it on our laptop computer. The only one of those three that has given us a semblance of comfort is the last one, and what we found was that it cost approximately $5,000 to administer the exam in that format, would require us to devote additional resources at the staff level, and also doesn't fully remove all of our security

concerns.

THE COURT: Well, what about the second option? It we seem to me that the state bar examiners would have the same incentive, as you all would, to provide security.

MR. BURGOYNE: They certainly, you would think, have the same incentive, Your Honor, but we don't control the staff. We don't know who they identify to come in and train people on how take make sure that when the exam has been administered, it doesn't get left on the laptop.

And I don't pretend to be an expert in computers, Your Honor, but we did submit an affidavit --

THE COURT: It's just that you don't control the situation.

MR. BURGOYNE: We don't control the situation is the fundamental problem. And this case even has an example, Your Honor. We have the manual that Mr. Goldstein relied upon so heavily as, you know, somehow demonstrating that we offer the exam, is a manual that we don't make available to the general public because it gets into test security issues.

On the other hand, the Maryland Board has now made it part of the public record. We don't control what third parties do, and we certainly don't control what had the Maryland Board does or how it decides to staff or what it does with issue to materials we provide.

Ten years ago, Your Honor, I think it's fair to say

that National Conference of Bar Examiners would have been congratulated, not criticized, for the manner in which it was approaching the question of making accommodations to individuals with visual impairments.

It's also true, however, Your Honor, that when the Department of Justice settlement agreement was entered into and when the National Federation of the Blind called upon other testing organizations to administered their exams using the very formats that we offer, technologies were available then as well. We offered material in our brief, Your Honor, that pointed out that the JAWS and ZoomText technology preceded the settlement agreement and the NFB resolution.

So I don't think it's fair to characterize those as suddenly coming on the scene after the Department of Justice entered into its settlement agreement. And as Your Honor knows, the Department of Justice has filed a statement of interest in this case, and one of the things they say is that this technology -- you know, they suggest that it wasn't around at the time of the settlement agreement, but it clearly was.

Your Honor, whether framed in terms of accessibility, appropriate auxillary aids, equal opportunity, or reasonable accommodations, the outcome in this case should be the same. Having done precisely what the Department of Justice and the National Federation of the Blind have encouraged us to do in the manner in which we deliver exams, it would be inappropriate to

conclude that we have violated either the letter or the spirit of the Americans with Disabilities Act.

On that basis alone, Your Honor, we believe the Court could appropriately conclude that judgment should be entered as a matter of law. We pointed not only to the DOJ settlement agreement, we pointed to the NFB's own statements regarding appropriate formats for making the exam accessible. And, again, accessibility is what the case is all about.

DOJ have identified -- has identified these formats as formats for making the exam accessible. The National Federation for the Blind has identified these formats as the suite of formats that will make the exam accessible. And by "accessible," both the DOJ and NFB surely meant to capture within that concept the notion of equal opportunity.

We certainly do not suggest in any way that individuals with visual impairments should not have equal opportunities. What we do suggest is that in providing the formats that we provide, individuals with visual impairments have equal opportunity.

Several courts, Your Honor, in similar cases have concluded as a matter of law that in this situation, summary judgment is warranted. We pointed the Court's attention --

THE COURT: In this, plaintiffs say that what you offer does not provide equal opportunity because they're used to using what they're requesting.

MR. BURGOYNE: Well, the question -- and similar claims were made in these other cases, Your Honor.

For example, in the *Jaramillo* case, the plaintiff said he couldn't use the exam administration formats that were offered on that licensing exam. What he wanted was ZoomText and JAWS, the same issue here, and the Court said no reasonable jury could conclude that the accommodations offered by the testing organizations were not reasonable as a matter of law.

Likewise in the *Fink* case, the Court addressed the undue burden issue and the question of whether someone's entitled to their preferred accommodation and said so long as the accommodations provided ensure an equal opportunity in access, you're entitled to judgment as a matter of law. And again, the plaintiff was not happy with the accommodations offered and would have preferred others, but the Court said that those that were provided are reasonable as a matter of law.

On the question of auxillary aids, Your Honor, we also pointed to the statutory and regulatory language dealing with auxillary aids. We certainly don't say that that's an exhaustive list. It obviously isn't, in either the statute or in the regulations. But I do think it's fair, Your Honor, to say that at a minimum, if a party like the National Conference of Bar Examiners provides its materials in formats which have been identified as, quote, "appropriate auxillary aids," then it is reasonable to say in that situation that access has been

provided.

If you do what the statute says, if you provide the formats that are included on the list -- it may well be there are others, but if you do what the statute says and include those formats, and if you do what the regulation says and you make those auxillary aids and services available, it is not unreasonable to conclude that you have met your obligations under the statute. It's what the Court referred to in the *Dobard* case, Your Honor, as ADA-supported auxillary aids or ADA identified. I'm probably missing the term, but the concept was obviously if Congress and the agency had both identified these sets of auxillary aids as appropriate, then you've met your legal obligation in terms of providing access.

Your Honor correctly noted, it isn't a situation where we're only offering Braille or we're only saying you can take it with large print. We have, in fact, made the exam available in a broad sweep of formats. And it's free for the state jurisdiction to provide additional accommodations: extra testing time, a scribe. Those are all things that, as the entity offering the exam, the state board can do.

On the question of offer, Your Honor, and whether or not NCBE offers this exam --

THE COURT: I take it the issue of overcompensation is not one in which you're pursuing, the fact that if they get both what they're asking, maybe they got too much time. Because you

didn't -- among other things, you weren't the one who determined the amount of time.

MR. BURGOYNE: Well, precisely, Your Honor. We didn't make the decision. I do think it's fair to ask why -- the affidavit suggests that if the plaintiffs were allowed to take the exam in their requested format, that is equivalent to the manner in which a sighted individual would take the bar exam. I do think it's fair to ask in that context, then, why an individual would need double time. There may well be an answer, but it's not --

THE COURT: It's not in the record.

MR. BURGOYNE: It's not in the record, Your Honor, but I do think it raises the question as to whether, in fact, it is equivalent; and what it suggests to me is -- and there could be no question about this -- even taking exam on a computer, you know, it's still -- a computer is reading the exam to you, not a human reader. And instead of a CD reading the questions, the computer is reading it. And presumably that's why they requested the extra time. It is not our decision on whether any extra time is given. That's made by the entity offering the exam.

Likewise, Your Honor, I think Mr. Goldstein made the point that there was record evidence from the healthcare providers that extra testing time was needed. Not documents we ever saw, because those documents -- that documentation isn't

provided to us. It's provided to the entity that reviews the documentation and administers the exam.

On the broader question, Your Honor, of whether or not NCBE offers the exam within the meaning of the statute -- and this is a pure question of law, statutory construction -- I think it is the correct conclusion that NCBE is not the entity that offers this, nor can it be viewed as a co-offerer, which is the fallback position for the plaintiffs.

If you look at the language of the statute, it clearly focuses, as Your Honor suggested, on who's administering this exam, who's making the arrangements for where it's going to be administered, et cetera.

Likewise, if you look at the regulation which implements 12189, which is 28 C.F.R. 36.309, it speaks in terms of the entity offering the exam having an obligation to make sure the exam is selected and administered so as to best ensure.

We've heard about the best ensure part of that language, but you haven't heard the mention "selected and administered" language. The party that selected the MBE as part of their bar exam was the State Board of Bar Examiners for the State of Maryland. Likewise, the entity that administers the bar exam is the Maryland Board of Bar Examiners. That entity is not the National Conference of Bar Examiners.

Mr. Goldstein also suggested that if you went to Websters and Roget's, you would find support for their position

on a broader meaning of the word "offer." Our position, Your Honor, is that the place to start is with the statute and the regulation, both of which, in our view, would support the conclusion that NCBE does not offer this examination.

THE COURT: Drawing analogies from the criminal law, isn't either aiding or abetting or -- that's not a good word -- but in principal, aren't you, effectively, the principal behind the offering of the exam?

MR. BURGOYNE: We are the principal behind offering an exam generically to state boards of bar examiners, as we offer various exams. But no given jurisdiction is obligated to purchase our exam. We developed the Multistate Professional Responsibility Examination. The State of Maryland has elected not to purchase that exam, not to include it within the scope of its bar examination.

We certainly make the exam available to state boards. I don't think that's what the Congress was addressing, nor do I think Your Honor that accepting the proposition that we don't offer the MBE leaves the plaintiffs without a remedy. As you suggested, there is a remedy, but it's a remedy against the State Board of Bar Examiners for the State of Maryland.

THE COURT: As I understand your reply brief, it ends up -- it doesn't end up with them taking this exam. The State Board's got to say, forget the money, for you all or everybody or --

MR. BURGOYNE: Well, there are options. This isn't -- the only accommodation isn't for the plaintiffs to take the multistate bar examination on a computer with their requested accommodation. That's correct, Your Honor.

The State of Maryland could say, you know, we've looked at your documentation, and we think there's an alternative approach here. We will waive the exam for you. Or it could say we will develop our own exam to test the subjects that are tested on the multistate bar exam, just as it develops its own essay component.

None of those obviously are optimal, Your Honor, and I'm sure the State of Maryland would say those aren't realistic options. But they are options, Your Honor, and it doesn't leave the plaintiffs without a remedy.

In fact, Your Honor, the State of Maryland has a specific set of procedures built into their rules specifically to give parties the opportunity to pursue administratively and in front of the Maryland Court of Appeals concerns they have about ADA accommodations. So there's a remedy there that is available.

It isn't correct to say that accepting the proposition that NCBE doesn't offer this exam leaves the plaintiff with no remedy whatsoever.

THE COURT: Just out the curiosity, how many state bar examiners buy your product, use your product?

MR. BURGOYNE: For the MBE, Your Honor, I think it's 48. A smaller number uses the MPRE. A smaller number uses the multistate performance test.

Your Honor, to respond quickly to a few points that Mr. Goldstein made. Then I'll shift over to the preliminary injunction standards.

There was a suggestion, Your Honor, made that screen-access software has been recognized by schools and employers as an appropriate accommodation. What you didn't hear in that sentence was that it has been recognized as an appropriate accommodation by state or private entities that administer secure examinations, that develop and administer secure examinations. And, again, I think that's an important distinction here.

I don't think it's fair to conclude in any sense that NCBE is being arbitrary by not offering this particular accommodation. It has very legitimate concerns, and this exam is very different from the other exam which it makes available in the electronic format.

There was a suggestion that we haven't offered any evidence or made any claim that the accommodation that's we -- or the formats in which we make the exam provide equal opportunity. I don't think that's a fair characterization of our papers, Your Honor. And if it is, I didn't do a very good job drafting my brief.

If we make the exam available in formats that have been called for by the Department of Justice and the National Federation of the Blind and many others, I don't think there's any other conclusion that can be reached than that we are making our exams available in a format that would provide a fair and equal opportunity. It is certainly our position that by providing the exam in the formats that we do, we are ensuring equal opportunity within the meaning of the law for individuals with visual impairments.

There is a suggestion that we're arguing for some nebulous reasonable accommodation standard. The standard here, Your Honor, is very straightforward. Do we offer the examination in a manner that is accessible? We believe that we do. That's the standard. That's the question for the Court, the central ultimate question before the Court.

We have used in some of our papers the shorthand "reasonable accommodations." So does the Department of Justice, Your Honor, when it talks about accommodations in the testing context.

The National Federation of the Blind when it entered into a settlement agreement with the Law School Admissions Council spoke in terms of "reasonable accommodations." That's simply a shorthand consistent with the overarching approach of the Americans with Disabilities Act.

It is not inappropriate for the Court to look to

precedent in the employment context or under Title II of the ADA, which has emphasized that what the Americans with Disabilities Act requires is reasonable accommodations.

There's nothing about the provision in the ADA that deals with standardized testing, which elevates the rights of examinees above the rights of all other individuals under the Americans with Disabilities Act. All the provisions in that statute are intended to guard against discrimination against individuals with disabilities, and no category of individual is entitled to greater or lesser protections under the statute.

The Court has noted in its own decisions, and other courts have noted, that at the end of the day if reasonable accommodations have been provided, the employer or the state entity are entitled to judgment as a matter of law, even if the accommodation they have not provided is not, quote, "ideal," is not the "best," is not the "preferred accommodation." Ultimately, if we have provided reasonable accommodations -- and in our view on this undisputed record, we clearly have -- we should be entitled to judgment.

I don't think, Your Honor, there was a discussion of the *United States v. Morton* case. I don't find the word "accessibility" particularly ambiguous. I think if you look at that word in the context of the ADA as a whole and in the context of all the history that has gone on in terms of making standardized tests accessible to individuals who are visually

impaired, I think we all have a sense of what accessibility means.

THE COURT: Mr. Goldstein says by itself it is ambiguous, that you could -- somebody would have to crawl to get to the exam, you know --

MR. BURGOYNE: I don't think we've asked -- he certainly isn't suggesting that we've asked anybody to crawl to get to the --

THE COURT: No, I understand. I know. It was just an abstract interpretation.

MR. BURGOYNE: It was.

I think that if you look at what has happened, which is to say that we make the exam available in multiple formats which we have been told are the appropriate formats to make written materials accessible to visual -- individuals with visual impairments --

THE COURT: And I guess your position is that "accessible," in context, means "reasonably accessible;" and in regulation, which says "best" is inconsistent with "reasonable."

MR. BURGOYNE: Well, if you interpreted that -- yes, if you interpret the statute as what they are urging you to do, in the manner they are urging you to do, then "best ensures" means far more than "accessible."

And I think, Your Honor, I can safely say that there wasn't a lot that the California Court agreed with the National

Conference on in that ***Enyard*** case, but the one thing it did say was that the plaintiffs appeared to be stretching things a bit when they suggested that their reading of "best ensure" was proper, given the fact that what the statute calls for is "accessibility."

It may have been the one bright spot in the decision, Your Honor.

THE COURT: I don't know, your bright spot wouldn't appear in whether you disagreed with them or not. It was appearing before the Judge. It was a very delightful thought.

MR. BURGOYNE: Well, I didn't have that pleasure, Your Honor. I was not lead counsel in that case.

Your Honor, no court has interpreted the "best ensure" language in the manner that they are calling for, and there have been dozens -- if not over a hundred -- cases interpreting the ADA's application in the testing context.

Your Honor, I'd also note one other thing quickly: The question of whether there's any record evidence on how these plaintiffs would perform via accommodations that we've offered.

I'm sure the Court saw this in the record, but the fact is that the National Conference of Bar Examiners on the exam which it does offer and as to which it does evaluate accommodation requests, provided accommodations to two of plaintiffs in this case on the Multistate Professional Responsibility Exam, and both of them did very as well and

achieved scores that enabled them to pass in every jurisdiction that uses the MPRE.

On the question of preliminary injunction, Your Honor, ***Winter*** clearly changed the landscape in all courts, including the Fourth Circuit, with its ***Blackwelder*** standard. And as the Fourth Circuit noted in the ***Obama*** decision, the ***Blackwelder*** standard was much less rigorous than what the Supreme Court has called for in ***Winter***.

Under ***Winter***, there must now be a clear showing that you are likely to succeed on the merits and a clear showing that there would be irreparable harm in addition to the equities favoring you and public interest favoring you.

I've already walked through why we believe as a matter of law we should prevail on the merits. And certainly in the face of all of that, it would be -- obviously, we don't think they're likely to prevail on the merits, Your Honor. I'll leave it at that.

On the question of irreparable harm, Your Honor, they've suggested that the controlling precedent here is a decision from the 1980s involving a student who was kicked out of, I believe, the University of North Carolina for cheating and then went in to get a preliminary injunction that would allow her to continue her education.

As we noted in our belief, that's a very different situation, as courts have noted, where somebody is already

underway and then comes in to get a preliminary injunction.

What that Court decision said, Your Honor, was that having a gap in your resume that you have to explain later, where professional stigma was found in the context of that case to be irreparable harm. To the extent those concepts are still viable in light of other Fourth Circuit decisions, Your Honor, we certainly suggest here that there has been no showing of actual and imminent irreparable harm by the plaintiffs.

We've cited two cases from the Fourth Circuit, district court cases, which have held in directly analogous cases that not being able to take a particular bar examination does not constitute irreparable harm.

THE COURT: It may just be a debater's point, but Mr. Goldstein is right. Certainly being subjected to a discriminatory practice itself constitutes irreparable harm; and, two, I'm sure when you took the bar exam, you thought yourself irreparably damaged if you were being deprived of a fair opportunity to pass the bar exam at all.

MR. BURGOYNE: I would, Your Honor, but all those assume that there's been discrimination and assume that I was not being given a fair opportunity. And it gets a bit circular at that point if in every case where someone comes in and says, I think I've been discriminated against, I need a preliminary injunction, if at that point we've already established the public or the -- public interest factor, as they allege, and

their argument is, if we sue you under the ADA, then we're pursuing a civil right; and pursuing a civil right is, by definition, pursuing the public interest. I don't think that should be the standard, Your Honor. Otherwise, every individual who files a request for preliminary injunction under the ADA and other civil rights laws has, by definition, established the public interest factor.

THE COURT: No, no. Actually, your response is very interesting. One could say that if you accept that being subjected to a discriminatory practice itself, ipso facto, constitutes irreparable harm, that becomes an immaterial factor for preliminary injunction in a civil rights case; that, in fact, you only look to the success on the merits and the balance of equities and public interest.

MR. BURGOYNE: Well, I think if I'm understanding you correct, Your Honor, our view is that you can't simply accept the fact that --

THE COURT: No, no. What I'm saying is if I thought that the plaintiff was likely to succeed, that would mean that he -- they were being subjected to a discriminatory practice; and so, therefore, ipso facto, being subjected to that practice would be -- itself constitute irreparable harm, regardless of the consequences, which is not passing the bar exam.

MR. BURGOYNE: I think at a minimum you would have to have concluded they are likely to succeed on the merits in order

to conclude that the public interest is served by -- the public interest factor by granting a preliminary injunction. I think that's what --

THE COURT: Well, let me ask you about the public. I don't want to put an argument in without -- that it is the way Mr. Goldstein, as my mind works, in sort of an institutional resolution.

Public interest, very often, is a factor which can be argued any way. You know, the plaintiffs' right is in the public interest to prevent discrimination, it's you're right. It's -- you know, that's not being --

I mean, here there is a public interest factor of having institutional resolution by -- I mean, there's no reason to think that your -- anybody is in any way biased, taking into account fairness of others and the state of technology and that it's better to have -- it's in the public interest to have a institutional resolution of this, at least in the first instance, as opposed to plaintiffs choosing their own method of examination.

MR. BURGOYNE: Well, I think you're absolutely right, Your Honor. There are other interests at stake, and the public interest factor should be broadly construed. What we do is we provide a product which has been found to be very useful to state boards and to courts which are looking to have competent, capable individuals assisting clients in court.

There is an interest at stake if we are told we have to start administering our product in a way that we think raises very legitimate concerns for our institution.

I also think, Your Honor, that you are certainly right, there was an alternative vehicle for getting through this, you know, other than a lawsuit. You know, we had the pilot program. It may just be we don't move fast enough, you know, in terms of -- or don't have the resources necessary to get to that point. In all events, we found ourselves in a lawsuit, Your Honor.

I also think it's relevant, Your Honor, that what the ADA says is take a balanced approach. Again, it gets back to the question of what's reasonable, and I believe that what we have done is reasonable.

And the last question, Your Honor, of balance of the equities, I think that ties in a little bit. We got into what the reasons are for the National Conference, including following the pilot program that these particular formats are not viable at the present time. Those are certainly equities on our side of the case that we think the Court should balance in the preliminary injunction analysis.

Ultimately, though, Your Honor, I think this case rises or falls on the likelihood of success on the merits and the question of whether they have made a clear showing that irreparable harm is likely. We don't believe either of those

have been made, and we certainly don't believe that this is a case which justifies a mandatory preliminary injunction which, as the Fourth Circuit has noted, should only be provided in the most extraordinary of circumstances. We do not believe this case presents such circumstances.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Goldstein.

MR. GOLDSTEIN: Your Honor, let me start by addressing this institutional interest question and whether there's an interest in having a predetermined menu of accommodations.

As I argued in my initial remarks, the Department of Justice was given the responsibility to implement Title III of the ADA.

THE COURT: I'm glad to see the Civil Rights Division, in some context, isn't interested in enforcing civil rights.

MR. GOLDSTEIN: Well, I can tell you my experience has been in the last year that they seem to be open for business again, so it's been nice to see.

But the implementing regulation chose a different approach than what you're proposing. The implementing regulation, which is not that unusual when compared to the similar implementing regulations elsewhere in the statute, did not make an unbounded promise that people with disabilities could have whatever accommodations they wanted.

But in addition to the fairness requirement, which is very much there in terms of the results, how the results reflect, they also set two other boundaries: The undue burden boundary and the fundamental alteration boundary. And so as a matter of law in construing regulations, if a plaintiff shows the accommodation is appropriate and it is not one that is unduly burdensome or fundamentally alters the nature of the test, then however sound your approach might have been to the regulation, the regulation provides otherwise.

And entitles the plaintiff to the appropriate -- the accommodation if they can show the following: It will produce a result that leaves them with the test reflecting their abilities and not their disabilities, which means no helpful advantage either. It doesn't go -- you know, it goes in both directions, it's symmetrical, and unduly burden and fundamentally alter.

So maybe it would be better as a matter of social policy for the regulation to say, each institution should have a prefixed menu and decide this is what's going to be there and nothing's a la cart. But that's not what the regulatory language is.

I think it was very critical to hear from Mr. Burgoyne that the MPT, the other exam that they offer -- which is not repeated and, therefore, not secure -- is one that they offer in electronic format and allow the bar to give. And indeed that's the case. These clients, if they take the bar at the end of

July, will be able to take the MPT using their screen-access software.

That's helpful because it helps put in focus that the distinguishing factor is security. And we have a very clear statement in the record that's not contradicted. And that is Mr. Brye, who is the director of security for the National Conference of Bar Examiners, in Exhibit C to the Opposition to our Motion for Preliminary Injunction.

In describing the protocol that they developed for the pilot program -- and that protocol, by the way, is all we're asking for here -- said: This protocol has been tested and in the view of the NCBE, is the appropriate means of sufficiently protecting the security of the NBE.

That is a statement under oath by the head of security, a very important adverb, I suggest, of "sufficiently protecting the security of the NBE."

We've also submitted to you --

THE COURT: Let me ask, Mr. Burgoyne, what do you have to about that?

MR. BURGOYNE: Your Honor, the issue's never been whether it's a theoretical matter. The issue is whether as a legal matter we have an obligation to do that, even in the face of the administrative security and cost.

THE COURT: But if the concern is security and your own person says it's sufficiently secure --

MR. BURGOYNE: Right.

THE COURT: -- what's the issue?

MR. BURGOYNE: Your Honor, that's why we developed the protocol in the first place as part of pilot program. But what we learned from that is that simply getting the exam to the point where you have a greater sense of comfort on exam security does not resolve all your concerns, Your Honor.

THE COURT: Okay.

MR. BURGOYNE: Your Honor, 90, 70 -- 80,000 people, whatever the number is, in that ballpark. 70,000 people take the multistate bar exam every year. Out of that number -- we don't know the exact number because we don't handle accommodations, we don't offer that exam, but some number, large number, significant number request accommodations. If we had to do for every examinee -- if suddenly --

THE COURT: No, I understand.

MR. BURGOYNE: It's just institutionally, it doesn't work. We have eight IT people. If we had to start --

THE COURT: That's fine.

MR. BURGOYNE: -- loading laptop computers around the country, it's not a viable option, Your Honor.

THE COURT: Mr. Goldstein, excuse me, I'm sorry. I didn't mean to interrupt.

MR. GOLDSTEIN: Not at all, Your Honor. I appreciate the interruption. I wish that there was some record basis for

what Mr. Burgoyne just said so we could deal with it.

It's pretty obvious that once you make one copy of an electronic version off your mainframe, you can make 20 copies and you can buy 20 laptops, and you can ship 20 laptops the way you can ship one. And fortunately, there's no cost, because as you know from the Elder -- exhibits to Mr. Elder's deposition, Erica Moeser sent a memorandum after we filed this case to every state bar in the country saying if we're required by a court to do this, each time a state bar gives the exam in accessible format, we're charging five grand to that state bar.

And the Maryland Board of Law Examiners has agreed to pony up $15,000 instead of using the laptops that they've got in the JAWS and ZoomText software they've got. They're prepared to pony up the $15,000 which is represented in Ms. Moeser's memorandum as covering the cost of doing this.

So from the point of view of institutional concerns and the balance of equities, two things are absolutely clear on this record: One, is it's not going to cost the NCBE is a penny now; and, number two, they have a system which sufficiently protects the security which they would follow if they did this. And that was testimony under oath from them.

So we're trying to grapple here with fog when there's simply no substance to support this concern.

Now, the question was raised, and I think it's a legitimate question. What if the person that is hired by the

board of law examiners can't be trusted? Just like what if the ACT, which administers the MPRE for the NCBE, should hire somebody who's not qualified or, goodness gracious, hires somebody who's a reader who wasn't qualified? That would be a bad thing too.

What if they hired somebody who was bad? Well, the fact is, from a security standpoint, there is no security against the dishonest proctor. There is such a thing as Xerox machines. There is such a thing as tape recorders. If that's the problem, it doesn't matter what the security is.

If there's a quality issue whether it's a reader or a somebody who advertently saves a copy of the file or makes a photocopy, that's just a problem.

THE COURT: But you can understand wanting to have control?

MR. GOLDSTEIN: Very much. Your Honor, I'm a trial lawyer.

THE COURT: Also by definition you're a control freak.

MR. GOLDSTEIN: Exactly. But, as my wife would say undoubtedly -- and I hope she doesn't stand up --

THE COURT: Counsel, we don't have to go there.

MR. GOLDSTEIN: -- there are limits to how much you can and should control. And the same is true for the NCBE when balance it again the rights of people with disabilities.

So it's not that I dismiss their concerns. What I'm

saying to you is that here they are too insubstantial in the face of what else is there.

And moving along, the next point I wanted to make is that Mr. Burgoyne pointed to ***Fink*** and ***Jaramillo***, two cases that were decided under 504. And in their reply, they point out that you said that the operative language of the two statutes would lead one to look to other authority.

The problem is the other statute you were referring to was Title II of the ADA. If you compare the 43 words in Section 12189 to the language of 504, you will find that the words "in," "shall," "with" -- and I think there's one other preposition -- are in common in the two statutes. You weren't talking about whether 12189 should look to 504 for authority. You were talking about Title II, which reads almost verbatim like Section 504, the Rehabilitation Act.

And the thing is that ***Fink*** and ***Jaramillo*** are no authority for your decision because they were decided under a completely different statute.

The ***Dobard*** case -- and if I could just take a moment to reach it.

***Dobard*** -- I'm fascinated to hear them cite that in argument, because ***Dobard*** said it was okay to provide an accommodation that wasn't effective for that particular plaintiff and ruled on that basis. And that probably is right under Title II, but it's not right here. You, yourself, said it

wouldn't be right if they offered a Braille exam to someone who doesn't read Braille.

And the problem is that we are -- for the NCBE is we are under a specific statute. They talk about having to get down in the weeds if they had to administer the "best ensure" standard, but the fact is, Your Honor, if you look at Section -- 42 U.S.C. Section 121127 -- excuse me, (b)(7), which is part of Title I, what you see as the standard for exams for employment is exactly the same language we're talking about here, except that the words "best ensure" are placed with "most effective." And I can't parse "best ensure" as meaning anything different than "most effective."

Why if this is reasonable to impose on employers for testing, the language is that it's discrimination to fail to select and administer tests concerning employment in the most effective manner to ensure that when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant.

"Most effective," "best ensured," nothing to pick with there. This is an appropriate standard under the ADA. If that's discrimination, than the DOJ acted appropriately in

making the "best ensure" standard define discrimination.

I am very intrigued to hear, on the one hand, Mr. Burgoyne say, Well, you know, maybe it is an unfair advantage to give them extra time. Why would that be a concern of an entity that doesn't offer an examination? I mean --

THE COURT: Of course it would be. I mean, if it's the one who professionally designs it. I mean, obviously he didn't say -- he said they wouldn't make the decision, but I would think they would be -- I think there would be a concern to any fair-minded person, particularly if you're responsible for creating it.

MR. GOLDSTEIN: Well, yes, it is -- I would agree it certainly -- on the other hand, they seem perfectly comfortable with the idea -- extremely offensive idea of having the bar say to the blind, Well, you don't have to stay the multistate; you can be a member of the bar without it. We're not really that serious about the qualifications we expect our lawyers to make, or We don't think you'll be a success in the law. Who knows?

But I was just appalled by the suggestion that, gee, there's a remedy here because the state can simply waive the blind taking the multistate.

But I agree with you that apart from any fair-minded person, the folks that offer the exam that develop it, that want to make sure it's fair, that want to protect its security, that want to make sure that it's comparable year from year, so if

that means reusing questions, need to be concerned about things like whether the amount of time is appropriate. And that's why -- by the way, I pulled --

We do have for each one of these, Dr. Miller explaining, for one, that testing is required time and a half for doing -- taking a test with assistive technology using electronic materials. And that was with respect to Michael Witwer. We have the same thing for each of plaintiffs explaining why. So, again, it's a question of documentation versus speculation.

Mr. Burgoyne said that we could have pursued this with the state. If you look at the state rules, we could have pursued an adverse decision by the board, Maryland Board of Law Examiners to the Court of Appeals -- actually to another committee and then a magistrate with the Court of Appeals. If only we had had an adverse decision.

There is no provision, sadly, when the Maryland Board of Law Examiners says, We agree with you completely but we can't do it. That's why we're here. I mean, pretty clear where the realm of the Court of Appeals comes out on this issue, but there was no road from A to B.

One of the other things that Mr. Burgoyne talked about was effective communications, that these were effective accommodations. There are two points I'd make there.

One is effective communications is a term that's in

the regulations in Title III. It's not a term in the statute. It's one we all accept; it's one we all work with; it's one that makes a lot of sense because the Department of Justice put it in there as the way of implementing the statute.

But the other thing is that the record is one-sided here on what's an effective communication; that is to say, you have three uncontested affidavits that for these individuals, a reader is not an effective accommodation; that for these three individuals, Braille is not an effective accommodation, nor is large print, nor is a CCTV. None of these are effective accommodations, and that expert testimony is uncontradicted on this record.

Now, with respect to the issue of irreparable harm, the fact is you only get to it if you're likely to prevail on the merits. And there's no question that if we're not likely to prevail on the merits, you never have to consider the issue of irreparable harm. But if we are likely to prevail on the merits, then you look to see how likely the harm is to occur, and sometimes that's tenuous.

But here, as a factual matter, there's not much question about it. If they're forced to take the exam under discriminatory conditions, which is what would happen if they choose to take the exam if you deny the preliminary injunction, that's certain to occur. Or having to take it later is certain to occur. But it's always circular. You always first have to

establish you'd like to prevail on the merits because, otherwise, there's not the a harm that's likely to occur.

And finally -- and I'm sure, you're glad to hear me say the word "finally." And, Your Honor, I appreciate your forbearance and the time and attention that you're giving this matter.

But, in terms of the balance of the equities, the fact that the NCBE has developed a protocol it finds sufficiently protects the security, coupled with the fact that it can and will recover the cost and administrative time from the Maryland Bar means that the balance of equities tips entirely in favor of the plaintiffs to take the exam with the appropriate accommodation.

And, Your Honor, Mr. Burgoyne said maybe the NCBE is not moving fast enough for the plaintiffs. Mr. Elder didn't choose when he was going to be born and when he was going to finish law school, but he has succeeded in finishing law school and he is entitled now to take the exam under fair conditions. And the -- if the merits are there, if it's warranted, then the NCBE does not have all the time in the world.

They have pointed out how long screen-access software has been around. I think they say it's been around 20 years. Isn't that long enough to figure out whether you can do this or not, and if you can't, to offer a court sound reasons?

Unless the Court has further questions, that would be

our submission. Thank you.

THE COURT: Thank you.

I'll rule, because I have to, given the time frame, and I am going deny the motion for preliminary injunction. Under Fourth Circuit law to consider four factors, of course, the first of which is whether the party seeking preliminary injunction have established that they are likely to succeed on the merits; secondly, that they are likely to suffer irreparable harm in the absence of preliminary relief; third, that the balance of equities tip in their favor; and, four, that an injunction is in the public interest.

I am not -- I cannot find that the plaintiffs have established that they are likely to succeed on the merits. I agree with them on the subject matter jurisdiction issue, as I indicated earlier in the hearing, and I appreciate Mr. Burgoyne's response to that.

And I understand it was appropriate for them to raise a subject -- for the defendant to raise a subject matter jurisdiction issue, but I am persuaded that the ***Kimmer*** case had to do with allocation of responsibility within and around the court system for matters relating to the bar examinations do not intend to deprive a federal court if they felt that federal rights were being interfered with from issuing an appropriate order.

But there are two grounds on which I have concerns;

although, I am not certainly not making any final ruling on this at this stage, as to whether had the plaintiffs will succeed on the merits.

First, although it as a practice seems counterintuitive and, as I said, cold, I am not persuaded that the defendant offers the examinations in question within the meaning of the statute. This may very well be an congressional oversight, because certainly there's nothing in the statutes to state that Congress would not have wanted the defendant covered. But the language used is that - U.S.C. Section 12189 is that, quote, "Any person that offers examinations related to licensing for professional purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities.

It is the Maryland Board of Examiners which determines the place and, to some extent, the manner -- although the manner here is in dispute -- but the place of the examination. And frankly, it seems to me, under Section 12189 is directed not to the test maker but to the person who is actually giving the exam, which in other contexts, in the professional responsibility context, the defendant does, but that is not a test here at issue.

I find further support for the concern about whether or not the defendant is an offerer within the meaning of regulations 28 C.F.R. Section 36.309 which requires, quote: Any

private entity offering an examination to be sure, quote, a examination is selected and administered as to best ensure the person's with disabilities are not a disadvantage.

That, to me, is not what is involved here. There is not a selection or administration of this test in any way about a defendant which is a private nonprofit entity.

Secondly, even if the defendant does offer the examination within the meaning of the statute, I am not persuaded on the present record that the examination is offered under with the conditions that the defendant is willing to make, renders the -- makes the examination inaccessible. It is not inaccessible to defendants.

Their technical arguments about how -- what other statutes you should look to and it's a little odd to incorporate into a statute language, but I think in context, "accessible" clearly means "reasonably accessible."

But in any event, I don't find the term ambiguous; so, therefore, I don't think one turns to implementing regulation. And, frankly, implementing regulation which talks about best ensuring is, to me, inconsistent with what the statute says. The statute is about making the examination accessible, which I think we all would agree is reasonably accessible but that does not convert into best ensure.

The issue of -- next the plaintiffs must establish is that they would likely to be suffered irreparable harm in the

absence of a preliminary relief. Frankly, I am inclined to agree with Mr. Goldstein that -- and if I were persuaded that the plaintiffs proved likelihood of success on the merits, the very fact of being subjected to an examination under discriminatory conditions would constitute irreparable harm, even though we don't know whether or not, as a practical matter, plaintiffs would pass the test, which is maybe a potential issue here, but, frankly, it's one I don't think anybody should be subjected to doing something under discriminatory conditions.

The balance of equities and whether the injunction is in the public interest seems to me the merge here. And effectively, Mr. Goldstein certainly wrote excellent papers and made excellent presentation, but I really do think that here the plaintiffs are asking for their preferred method of taking the test. I think that is what this, in the final analysis, is all about.

They may very well be entitled to after a full record is developed; but, frankly -- it may be a conservative instinct on my part, but I think that having the decision as to whether the test is the appropriate one should be -- is best made institutionally after considering of all relevant factors by a party which -- there's nothing on this record to suggest the defendant is in any way biased. I think that you have various competing concerns, and -- that the defendant needs to consider. And, it seems to me, that that is best resolved by the

defendant, not by the plaintiffs choosing the way they want the test administered to them, or by me saying that sounds like a good idea. It does sound like a good idea to me.

I have no reason to doubt anything about these plaintiffs. They are admirable people, and I have no real reason to doubt what their experts say, but I am uncomfortable in making determination, and also there is -- although, it may be a minimal risk, there is a risk that -- at least enunciated by the defendant -- about the security of the test. I would not want to be issuing an order which could result in the whole -- in insecurity of the bar examination. So I'm denying the motion for preliminary relief.

Now, I realize this is ironic when I now say this because I think the defendant's position was that they're not going to provide materials absent a court order, and I'm not giving the court order.

There's nothing to stop the defendant from going back and considering: This examination is coming up, the Maryland, we can work out security concerns, we can -- we've had a test, you know, there's a pending litigation, let's expand the test and see -- let these three people take the exam with the enhanced material.

There's nothing wrong doing voluntary that which has not been ordered, even if you said I'm going to need an order. I realized I'm probably whistling in the wind, but that makes

perfect sense to me in the context of this litigation. The defendant's going to face litigation expenses. I'm denying his motion to dismiss -- although I think that there's potential merits to his position. As matter of litigation management, it makes much more sense to consider that issue in the context of the whole case. And I want a full record developed on the issue of the appropriateness of the test -- excuse me, of the accommodations which have been offered --

Excuse me, I should also say in the background, I do find that the defendant has offered accommodations which are historically sound, and they've been accepted by the Department of Justice in other circumstances; in which, frankly, provide a basis to show that it is acting in entirely reasonably to make the examinations accessible to the plaintiffs.

That said, there's not wrong with offering a little bit more in term of these tests if there really is a concern. There's certainly litigation expenses faced by the defendant here; there is the uncertainty of the outcome. There have been tests conducted in the past about these examinations. I don't know, there may be other concerns, but I certainly wouldn't want the mere fact that the litigation has been brought to prevent a defendant from considering law.

These three people, the bar examination is coming up, let them take the bar examination. They're qualified people. They have doctors who say they need these things. We can

consider, in due course, whether or not we want to expand what we offer to allow the kind of things they're asking for, the JAWS and the Zoom, whatever. But we don't have to make that decision now, and we can make an accommodation and we can work out with the bar folk ways to make this secure that we're satisfy. That's my hope. I realize it is no more than a hope, and it is one which is contradicted by the fact that hasn't happened so far.

So that's my ruling. I am denying the motion for preliminary injunction for the reasons I've stated. Thank you.

(Proceedings adjourned at 4:16 p.m.)

* * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

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Julie A. Wycoff, RPR
Official U.S. Court Reporter

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